No. 5703

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST,
Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

Appellant is a corporation organized under the laws of the State of Minnesota, and resident therein. In 1912 it became the owner of approximately twelve thousand acres of land lying about ten miles north of the City of Sacramento, in this state, which it subdivided into five and ten acre tracts for the purpose of selling the same. It issued literature descriptive of its project and in addition employed salesmen and agents. In September of 1921 appellees purchased a ten acre tract of land from appellant at a price of two thousand seven hundred and fifty ($2750.00) dollars, which they subsequently paid, whereupon the land was conveyed to them by appellant. On February 6, 1928, approximately six years and four

months after they purchased the land, appellees began this action seeking to recover damages for alleged fraud in connection with that purchase. Their complaint alleged that though now citizens of California, they were at the date of their purchase, residents of the State of Minnesota; that they were wholly unfamiliar with California farm and fruit lands, and with the nature, quality and values thereof; that with intent to cheat, and defraud, them, appellant falsely represented that all the ten acre tracts of land in California then being sold by it were of the fair and reasonable value of two hundred seventy-five ($275.00) dollars per acre; that all of the land was rich and fertile and capable of producing all sorts of farm crops and products; that it was entirely free from all conditions and things injurious or harmful to the growth of fruit trees; that the land was perfectly adapted to the raising of fruits of all kinds and in commercial quantities, and capable of producing large crops of any kind of deciduous fruit planted thereon, and that the crops were of the finest quality; that these representations so made as to all of the lands being sold by appellant were also made particularly as to a certain ten acre lot which appellees actually purchased; that the appellees in purchasing the lot relied solely upon these representations; that the representations were false, both as to the particular lot purchased by appellees and as to all of the lands being sold in that locality by appellant and that none of the lands so being sold, including the lot purchased by appellees were worth in excess of fifteen ($15.00) dollars per acre, as opposed to the represented value of $275.00 per acre. It being

apparent from this pleading that appellees' cause of action was barred by the limitations thereon contained in Subdivision 4 of Section 338 of the California Code of Civil Procedure, appellees attempted to complete the statement of their cause of action by alleging that they did not discover the falsity of the representations, or any of them, until January, 1928. It was also alleged that prior to this discovery, they had expended $9,757.00 in improvements upon the property, which they alleged to have been of little value because of the falsity of the representations under which the land was sold to them, and adding to these amounts a request for punitive damages in the sum of $5000.00, they prayed for a judgment in the sum of $17,007.00 as being the detriment they had suffered by the alleged fraudulent acts of appellant.

The demurrer of appellant to this pleading having been overruled, appellant answered, denying in substance the whole of the allegations concerning fraud and damage, and pleaded in addition, the Statute of Limitations above referred to. The case was tried to a jury, which rendered a verdict in favor of appellees for $1800.00, from which judgment this appeal has been taken.

The questions presented involve errors alleged to have been committed in the proceedings below, in the overruling of appellant's demurrer; in the admission of testimony over the objection and exception of appellant; in the charge of the Court to the jury; and, in the refusal of the Court to give instructions requested by appellant, all of which matters appear more fully in the Bill of Exceptions herein.

SPECIFICATION OF ERRORS RELIED ON.

(1) The Court erred in overruling appellant's demurrer to the complaint filed in the above entitled action.

(See Assignment of Errors, page 21 of Transcript, Assignment No. I.)

(2) The Court erred in denying appellant's motion for a directed verdict.

(See Assignment of Errors, page 22 of Transcript, Assignment No. III.)

(3) The Court erred in instructing the jury on the subject of the representations claimed to have been made by appellant to appellees.

(See Assignment of Errors, page 23 of Transcript, Assignment No. VI.)

(4) The Court erred in refusing to instruct the jury on the distinction between representations of fact and matters of opinion, as requested by appellant.

(See Assignment of Errors, page 35 of Transcript, Assignment No. XIV.)

(5) The Court erred in refusing to give the instruction requested by appellant regarding discovery of representations as to value.

(See Assignment of Errors, page 36 of Transcript, Assignment No. XV.)

(6) The Court erred in refusing to instruct the jury at the request of appellant concerning the effect of discovery by appellees of the falsity of any material representation made to them.

(See Assignment of Errors, page 35 of Transcript, Assignment No. XIII.)

(7) The Court erred in refusing to give Appellant's instruction No. I, upon the question of the Statute of Limitations.

(See Assignment of Errors, page 33 of Transcript, Assignment No. XII.)

(8) The Court erred in instructing the jury on the question of appellees' reliance upon the alleged representations.

(See Assignment of Errors, page 26 of Transcript, Assignment No. IX.)

(9) The Court erred in instructing the jury on the question of appellees' knowledge of the falsity of the alleged representations.

(See Assignment of Errors, page 24 of Transcript, Assignment No. VIII.)

ARGUMENT.

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE-ENTITLED ACTION.

The complaint of the appellees appears on pages 1 to 6 of the Transcript, and the demurrer thereto, interposed by appellant, appears on pages 6 and 7, and on page 8 is set forth the minute order of the Court overruling the demurrer. The demurrer was both general and special and in addition set up the Statute of Limitations. This Statute of Limitations is found in the California Code of Civil Procedure,

being Subdivision 4 of Section 338 thereof, and reading as follows:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
>
> *Within three years:*
>
> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake."

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, pending on appeal in this Court, is a full discussion of the rules of law applicable to cases of fraud brought more than three years after the accrual of the cause of action, together with a full citation of authorities upon which appellant relies herein. For the sake of brevity we will not repeat in extenso the arguments and authorities advanced therein and quoted, but will state briefly the propositions we wish to advance in support herein of our claim that the Court erred in overruling appellant's demurrer.

The following statement of the rule as applied to the matter of pleading is taken practically verbatim from the opinion rendered by the California Supreme Court in the case of *Lady Washington Consolidated Company v. Wood,* reported in 113 Cal., 486:

The right of a plaintiff to invoke the aid of a Court for relief against fraud after the expiration of three years from the time the fraud was committed is an exception from the general statute on that subject

and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. *This is an element of the plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the Court to entertain his complaint.* "Discovery" and "knowledge" are not convertible terms and whether there has been a discovery of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the Court from the facts stated. It is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the Court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.

Testing the complaint filed herein, we find the only attempt made by appellees to bring themselves within the rules of pleading above stated is found in paragraph IX of said complaint, wherein it is alleged, "that plaintiffs did not discover the falsity of said representations, or any of them, until January, 1928." The complaint states nothing whatever in addition to the above quoted words upon this matter.

Referring again to the *Lady Washington* case above cited, we quote the following from the opinion therein as particularly applicable to the situation presented in the case at bar:

> "Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute * * * It was necessary for the plaintiff to allege not only the facts constituting this fraud, but also the facts connected with its discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that 'it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith until within six months preceding the filing of the complaint herein.' It is not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject."

A clearer case of insufficiency of pleading could scarcely be made out. The complaint stands as though the same contained no allegation whatsoever as to the

discovery of the fraud, for under the authority above cited, the allegation of non-discovery standing alone is but the allegation of a conclusion of law and not an allegation of fact and hence adds nothing to the complaint.

Though appellees were remiss in not properly pleading this matter, attention to the insufficiency of their pleading was directed by the special demurrer interposed by appellant, who demurred that the complaint was uncertain in that it did not appear therefrom what facts were discovered by plaintiffs in January, 1928, or thereafter from the discovery of which plaintiffs allege that they became informed of the alleged falsity of the representations. We will later discuss the matter of the statute of limitations in connection with the instructions given upon the subject by the Court, and in connection with instructions requested by appellant and refused by the Court, and in connection with the denial of the Court of appellant's motion for directed verdict directed at the same matter. It is herein presented purely as a proposition of pleading and we respectfully submit that the demurrer pointed out a fatal defect in the complaint steadily insisted upon, and that the error in its overruling necessitates a reversal of judgment.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

We next discuss the matter of the Court's denial of appellant's motion for a directed verdict. The

grounds for the motion appear on page 22 of the transcript.

(1) Among other things, the motion was directed to the insufficiency of the evidence, to show that the cause of action sued upon was not barred by the statute of limitations. As we have said heretofore, there appears in the brief filed herein by appellant in the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, a full discussion of the rules of law applicable to this matter, both as to the requisite of pleading and as to the requisite of proof, and we will not repeat herein what is there said, except to state these rules and cite some of the authorities therein quoted from. We assert in the beginning, that where the transactions complained of occurred more than three years prior to the commencement of the action, it becomes the burden of the plaintiff, not only to allege the facts bringing the case within the exception to the general rule, that is the facts involved in the discovery of the cause of action, but it is likewise his burden throughout the trial to prove by the evidence that his cause of action is not so barred. It is important, we submit, that this matter of the burden of proof be borne in mind. Ordinarily, the statute of limitations is a defense waived unless asserted. But the provisions of the statute allowing an action to be commenced, in cases of fraud, more than three years after the cause of action arose, is an exception to the general rule and being such wherever it is necessary for a plaintiff to bring actions within that exception, he is upon well understood principles, held to assume, and he must bear, the burden both of

pleading and evidence, to show that he is within the exception. As a bald allegation in the pleading alleging non-discovery until a date within the three years period is totally insufficient, is a mere conclusion of law and does not aid the pleading; so, testimony to the same effect is not testimony as to a fact, and proves nothing.

Turning to the evidence introduced upon this matter, we find that the sole testimony of appellee, H. A. Lindquist, upon the matter appears on page 46 of the transcript. It is brief, and we quote it as follows:

> "I did not find out before 1927 that that land was not fruit land, nor that it was not worth two hundred seventy-five dollars an acre. Before 1927 nobody told me that that was not fruit land there, nor that it was not worth two hundred seventy-five dollars an acre."

Concerning the matter of his investigation as to the truth or falsity of the representations made to him, he said:

> "I did not talk with any of my neighbors there about the soil nor about the land. I saw fruit orchards in another district there, but not where my lot was."
>
> (Transcript page 45.)

On page 41 of the transcript, he said:

> "I did not find out how thick the hardpan was until I dug the well pit in the fall of 1926. The hardpan went down sixteen feet."

His co-appellee and wife, Selma A. Lindquist gave likewise meagre testimony upon this matter. She said, (Transcript page 48):

> "I did not find out before 1927 that that land was not adapted to raising fruit. Nobody ever told us it was not * * * We never heard from anybody that it was not worth two hundred seventy-five dollars an acre. People thought we did not pay much. The others paid more."

The case then stands upon this matter that appellees gave no testimony whatever concerning discovery, save their bald statement of the legal conclusion that they did not discover the fraud until within the three year period. But, more than this, appellee, H. A. Lindquist, says he never made any investigation whatsoever upon the matter. These people lived on the land for six years and four months before they filed their action, and if their conclusion above quoted be true, lived upon the property and made the usual and customary use thereof for five years before they discovered the falsity of the representations as they now seek to prove them to be. It was not necessary for Lindquist to testify that he made no effort, for it is apparent that if he had made any effort to discover the falsity of the alleged representations made to him, he could not have failed to discover the falsity of such representations within an hour after making his investigation.

Let us consider first the matter of the adaptability of the land to fruit. He had eighteen inches of soil over sixteen feet of hardpan, if his testimony is to be taken as true. (Transcript pages 40 and 41.) He discovered the depth of the top soil six years and four months before he commenced his action. Had he asked anyone qualified to tell him, he would have been told

undoubtedly either that this soil depth was insufficient or that it depended upon the thickness of the hardpan under it. Well pits from which he could have discovered the thickness of this layer of hardpan were all about him, just as he did discover it in 1926 when he dug his own well pit. Having furnished that information he would then have been told by any qualified person all that he subsequently claims to have learned.

The case is even stronger upon the representations as to value. He alleges that the value of his land is fifteen dollars per acre and in addition that none of the thousands of acres of land surrounding him is worth more than that, although all of it was represented to him to be worth $275.00 an acre, about sixteen times more than he alleges it to have been actually worth. Such a glaring discrepancy could not have remained undetected had he asked any qualified person the simple question, "What is my land worth?" And had he asked such question and received the information which he claims to have discovered in 1927, to-wit, that his land was worth but fifteen dollars per acre, definite legal results would have followed: He would have known he had a cause of action for fraud and deceit, and would have known the extent of his damage, for the represented value equalled the price paid, and he was damaged for the difference between the actual value and the represented value, or purchase price. The statute of limitations would begin to run immediately as to his cause of action, and further, he would have immediately been put upon notice that he had been falsified to also in respect to the

adaptability of his land to fruit culture, for it is the law that if a man discovers, or should have discovered with reasonable diligence, that one material representation upon which he had bought was false, he is immediately put upon notice as to the falsity of any other material representation made to him in the matter.

> "Where a party to a contract ascertains that the other party has falsely represented one material matter in the transaction, it is notice to him that the representations as to other matters may also be false, and it is therefore incumbent upon him to thereafter make a full investigation as to the truth or falsity of all such matters."
>
> *Gratz v. Schuler,* 25 Cal. App., 122;
>
> *Ruhl v. Mott,* 120 Cal., 668;
>
> *Bacon v. Soule,* 19 Cal. App., 428.

In this case, we hold this proposition to be self-evident from a consideration of the testimony of the appellees, that had they made the slightest investigation upon moving upon their property, at which time, of course, every opportunity was open to them, and nothing could have been concealed, they would immediately have discovered everything which they claim to have discovered five years later. They made no investigation whatever, or if they did, must be held to have falsified in their testimony about it, because they could not make an investigation and not discover, and, therefore, could not make an investigation and claim in their testimony they had not made a discovery.

Therefore, their cause of action was barred, and the evidence was totally insufficient to support the

implied finding of the jury that their suit was not too late.

We desire to quote from *Montgomery v. Peterson,* 27 Cal. App., 675, upon this matter:

> "But passing this point, together with the more serious question of whether or not the complaint shows a sufficient excuse why a discovery of the fraud was not made within three years, we think that the evidence in the case fails utterly to sustain the finding of the Court in favor of the plaintiffs in that regard. Subdivision 4 of Section 338 of the Code of Civil Procedure, provides that in the case of fraud or mistake the action must be commenced within three years after the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this state it is not enough to assert that the discovery was not sooner made. *It must appear that it could not have been made by the exercise of reasonable diligence; and all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced.*
>
> *(Truett v. Onderdonk,* 120 Cal. 581, 588, (53. Pac. 26) ; *Lady Washington Co. v. Wood,* 113 Cal. 482, 486, (45 Pac. 809) ; *Del Campo v. Camarillo,* 154 Cal. 647, (98 Pac. 1049) ; See, also, *Wood v. Carpenter,* 101 U. S. 135, 140, (25 L. Ed. 807))."

Appellees knew that they had bought this property in implicit reliance upon statements in respect to the quality and value thereof made to them by the adverse party in interest, the seller. They are people of common and ordinary intelligence; Lindquist was forty-six years old; they knew, then, that in so relying, they had done something which, although warranted, was contrary to the ordinary and usual course of prudent

buyers. Conscious of this fact, they moved upon the property and were immediately presented with every possible avenue of information. Nothing was, or could have been, concealed from them. It was then their plain duty to investigate. Investigation would have disclosed; therefore, when they moved upon the property they were charged with knowledge, and the statute of limitations began to run against their cause of action whether they had actual knowledge or not.

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* pending on appeal in this Court and numbered 5671, appears a full discussion, with copious citations of authorities in respect of these matters we are now discussing. We will not burden the Court with a repetition here, but the language of the California Supreme Court in the case of *Johnston v. Kitchin,* 265 Pac., 941, is so apt upon the proposition that the representation as to value was not and could not have been concealed as regards its truth or falsity, that we quote the following from it:

> "What secret, may we ask, could be suppressed that would or could affect the value of a commercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public? We know of none and think in a practical sense none can exist."

When appellees moved upon this property, therefore, they were charged with knowledge, because:

> "If the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."
>
> *Angel,* Lim. Sec. 187.

We submit that the appellees' cause of action was barred as a matter of law; that they failed to sustain the burden of proof which was theirs; that the bar of the statute had intervened and therefore, that the trial Court erred in refusing to grant appellant's motion for a directed verdict based upon that ground.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE SUBJECT OF THE REPRESENTATIONS CLAIMED TO HAVE BEEN MADE BY APPELLANT TO APPELLEES.

(a) The charge of the Court upon the subject of representations appears on pages 23 and 24 of the transcript. We submit that the Court erred in instructing the jury in effect that all the statements in appellant's booklet applied to the lot purchased by the appellees. Appellant was engaged in marketing a large tract of land, containing originally 12 thousand acres. The booklet introduced in evidence and issued by appellant (being Plaintiffs' Exhibit No. I) was one containing general staatements only, no mention being made of any particular tract. The charge of the Court was, of course, concerned solely with the lot purchased by appellees, for it was immaterial to Court and jury what representations may have been made, except as they were applicable to the lot purchased. The Court told the jury that the statements in the booklet did apply to the lot selected by appellees and that as to that lot it made the representations which it was in the complaint charged with having made, leaving to the jury only the question of their falsity. But the booklet informed appellees,

when fairly construed, that the quality of the soil in the various lots, particularly the hardpan or subsoil, varied, and likewise that its adaptability to fruit culture varied. For instance, on page 5 of the booklet, appellees were told that a variety of trees, under varying conditions, had already been planted in the district, and that as a result, appellant knew what fruits were best adapted to the various tracts of land and what fruits were adapted to the tract as a whole. Again, on page 20 of the booklet, the purchasers were advised to select one or two kinds of fruit to which their particular tract might be best adapted. Again, on page 22 of the booklet, the purchasers were advised of the existence of the impacted strata in the subsoil, and that it varied in texture and character to such an extent that blasting was sometimes required to shatter this subsoil to secure drainage and freedom for tree roots. They were told expressly that these conditions varied and that advice would be given them as to the treatment each individual tract required.

We submit that under a fair interpretation of this booklet, it was a question for the jury as to whether or not general statements as to the adaptability of the land for fruit culture could have been understood by the appellees to apply to their particular tract, and that, therefore, whether or not these representations were made should have been left to the jury, and that the Court was in error in taking that matter from the jury.

(b) The Court charged the jury (Transcript page 24) in effect that the representation as to value likewise had been made, for the Court stated appellees

and a brother had testified that Amblad, the salesman, had told them the land was worth $275.00 per acre and that Amblad had not denied it. But, this instruction ignores the proposition that under the facts and circumstances under which the statements may be assumed to have been made, it was a question for the jury to determine whether or not this was a representation of fact or a statement of opinion only. We submit that it was for the jury to determine this, and that it was error for the Court to tell them that it was a representation of fact.

It is the rule that even positive statements as to value are generally mere expressions of opinion, and as such cannot support an action of deceit. (*Kimber v. Young,* 137 Fed. 744.) The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this, and a buyer has no right to rely upon such statement. (*Kimball v. Bangs,* 144 Mass. 321.)

(c) We submit the Court likewise erred in stating, with respect to the land of appellees, that appellant had in its booklet told them, "Moreover, it states in this book that it is proven beyond a doubt. Nothing stronger can be said than that, gentlemen, that it is proven beyond a doubt that this land is adapted to commercial orcharding." (Transcript page 135.)

The expression referred to by the Court in the above quoted portion of its charge was taken from a letter published in the booklet, signed by a Mr. Brosius. The letter referred to the Rio Linda District and purported to be a general statement concerning the entire

district. In the face of the information as to the variability of the land in respect of its quality and its adaptability to the growth of the different kinds of fruit, we submit that the quoted portion of the Court's charge viewed in respect of its particular application of appellees' land, was not warranted.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DISTINCTION BETWEEN REPRESENTATIONS OF FACT AND MATTERS OF OPINION, AS REQUESTED BY APPELLANT.

Appellant requested the Court to instruct the jury as follows:

> "You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit."

As we have heretofore pointed out it was a question for the jury to determine whether or not the representations in respect to value, which were alleged to have been made, were in fact representations or matters of opinion only. The Court should, therefore, have given the jury the benefit of the instruction requested in order that the jury might have in mind and so consider the proposition of whether or not the statements of value alleged to have been made amounted only to matters of opinion.

THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION REQUESTED BY APPELLANT REGARDING DISCOVERY OF THE REPRESENTATIONS AS TO VALUE.

Appellant requested the Court to instruct the jury as follows:

> "You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant."

On pages 141 to 143 of the transcript there appears the instructions given by the Court concerning the matter of discovery of fraud. A reading of it will disclose that nowhere did the Court instruct the jury that there was any duty cast upon appellees to exercise any diligence whatever in discovering the fraud they claimed had been practiced upon them. The uttermost the Court went in that direction was to tell the jury that if they did in fact discover they were defrauded, or did in fact discover facts sufficient to put them on notice, then their suit was too late if filed more than three years after such discovery. That was not enough to state their duty under the law, as we have hereinbefore asserted. And, although the Court discussed the matter of discovery as to the falsity of representations pertaining to quality and character of the soil, it utterly failed to discuss the question of discovery of falsity of value representations. Under the authorities we have hereinbefore quoted, the instruction requested was a correct statement of the law. The use of diligence was required.

The jury should have been so instructed, but upon this question of discovery of falsity in the value representations claimed to have been made, the Court instead of telling the jury that plaintiff was required to exercise due diligence to make the discovery, and that if due diligence would have brought about the discovery he is charged with knowledge, told the jury in effect that if he did not have actual knowledge on this matter before February 6, 1925, three years before he commenced his action, his suit was on time. Of course, if appellees knew the falsity or were chargeable with knowledge of the falsity in respect to the representation as to value, then they knew of the existence of their cause of action and the statute would start running, and it was not necessary that they should then know of the falsity of other representations upon which they may have relied. Far from requiring any diligence of appellees, the Court told the jury, "He is not obliged to employ an expert to tell him about it. If, believing the representations in the first place, and he then relied on the further representations allaying his suspicions, he is not bound by the limit of time until he makes the actual discovery." The Court was here referring to some testimony that when appellees discovered the hardpan, an agent of appellant had told them it was not objectionable, but nothing was ever said to them by the appellant or its agent concerning the matter of value, so the Court here in effect told the jury that appellees were not bound by the limit of time until they made actual discovery. This was clearly erroneous. Again, the Court said: "If you do not find

from the greater weight of the evidence that the plaintiff had knowledge before February 6, 1925, or had notice of such facts that with reasonable inquiry they should have had knowledge, then their suit is in time." This excludes all idea of the duty of appellees to exercise any diligence whatsoever in discovering fraud after they had moved upon the property and the most ample means of information lay ready at hand.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S INSTRUCTION NO. I UPON THE QUESTION OF THE STATUTE OF LIMITATIONS.

The instruction requested by appellant in this connection appears on pages 33 and 34 of the transcript. This instruction does concern itself with the questions of reasonable diligence in discovery of fraud which we assert the law requires of appellees under these circumstances. Our authority for this assertion has been hereinbefore fully discussed in this brief, and even more fully discussed in the brief filed in the *Melin* case hereinbefore referred to. It is, to our minds, clearly decided by innumerable decisions of the Appellate Courts of the land that after a bargainer has bought without investigation and in express reliance upon statements of the seller concerning the property which is the subject of sale, and when after such purchase seasonable opportunity is given to him to determine the truth of these representations, he has so expressly relied upon, that there arises a consequent duty to exercise reasonable diligence to detect whether or not there may have been falsity in the

statements made to him. What possible meaning can be given to the consistent use of this word "diligence" by our Courts, except that it means an effort to be made to search out the truth of the seller's statements. All men everywhere are required by the law to exercise diligence in respect of their rights. Our Courts have frequently and definitely held that where in the making of the bargain full and fair opportunity of testing the truth of the seller's assertions are open to the buyer he must embrace them and if he does not, cannot be heard to claim that he relied upon the untested statements and was by them deceived. If under proper circumstances, the buyer is entitled to rely, and being so entitled does rely upon the seller's statements, nevertheless when opportunity is thereafter presented to him to test the truth of these statements, it is his duty then to embrace it and under such circumstances if he fails to do so he is not aided by his sloth, for if reasonable diligence in testing the truth of the statements would have disclosed the falsity of the same, then he is charged with the knowledge that would then have thus been his, and the statute of limitations begins to run against his cause of action. This is all that the requested instruction was designed to inform the jury. Not only in this case, but in the twenty-four companion cases tried by the same Court and the same judge, and presenting the question of limitations of actions, this same instruction was requested and always refused. As we have pointed out, the matter therein contained was not included within the charge of the Court, and that matter, to wit, the duty of appellees to exercise diligence

and to test the truth of the statements that they had relied upon when they moved upon the land and were possessed of the full opportunity to do so, was nowhere laid before the jury. Rather the Court sought in each case to pardon the appellees their patent failure in this regard.

THE COURT ERRED IN INSTRUCTING THE JURY UPON THE QUESTION OF APPELLEES' RELIANCE UPON THE ALLEGED REPRESENTATIONS.

On pages 26, 27 and 28 of the transcript appears an instruction given by the Court and excepted to by the appellant, (Transcript page 145), touching upon the question of appellees' belief in the alleged representations and their reliance thereon. This instruction is objectionable as being not so much an instruction by the Court, or a commenting by the Court upon the evidence, as an argument by the Court in favor of appellees.

For instance, the Court said therein:

> "Did the plaintiffs believe them? They say they did. They were Minnesotans; they knew nothing about California or California fruit, from the practical side, never having been here. All the knowledge they had they got from defendant's literature, and talking with their neighbors, so they say. * * * He finally told them on the 29th of September, if you don't buy before October 1st the land is going up in price. That appealed to their sense of thrift, and they did sign the contract that night. * * * Ask yourselves, what does California stand for in the east, what its trademark is other than climate and fruit. I want to say right here, gentlemen of the jury, that the law presumes that all transactions are

> fair and honest until that presumption is overcome by the evidence in the case. But the resources of California and the state are great enough that they need no false representations to sell them abroad. It is not good for the state. I am not saying there were any. That is left for you. You must not get the idea into your head that just because you are Californians you must uphold the credit of the state and the value of its lands by thinking that that was ordinary puffing for the selling of land, if they were false. * * * You cannot induce any man to enter into a bargain by false statements and escape liability."

With all respect to the learned judge who so addressed the jury in this connection, it is difficult for use to believe that the judicial temperament was not influenced and the judicial utterances were not colored by strong belief on the part of the Court that a verdict should have been rendered in favor of the appellees. And, we respectfully suggest that whether or not the Court did so depart from judicial standards, the effect upon the jury could only have been a belief on their part that the Court desired them to bring in a judgment against the appellant. May we not respectfully suggest that the language we have above quoted is argument and not comment? Does it not use the language of special pleading? Was it necessary in commenting upon the evidence to the jury that it should be warned against being swayed by state pride, that they should be told of what was not good for the state? We submit that herein the trial Court exceded the bounds of proper comment upon evidence and fell into the error of making an argument against the cause of the appellant. The argu-

ment of appellees' counsel might have been more trenchantly phrased but would have lacked the force and prestige of the remarks from the bench.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLEES' KNOWLEDGE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

The Court gave an instruction to the jury concerning the question of appellees' knowledge of the falsity of the statements it was alleged to have made to appellees. The same appears on pages 25 and 26 of the transcript. It was duly excepted to. (Transcript page 145.) We will not repeat this instruction here, but will ask the Court to give its attention thereto. Here again, we respectfully submit that the learned trial Court exceeded the bounds of proper comment and entered into the field of argument. We believe the jury were by these remarks of the Court left in a state of mind such that there was in their opinion no question but what the appellant had full knowledge of the falsity of the representations made when it made them, and we believe this was particularly injurious because there was throughout the case the question of whether or not the representations were matters of fact or matters of opinion only. The minds of men have differed markedly not only on questions as to value of real property contiguous to a populous city, but also as to adaptability of various kinds of soil to the growth of fruits. The wisdom of yesterday has frequently been proven false by the later wisdom of today. What was commercially profitable

fruit culture in 1921 when these lands were sold would have driven the orchardist to insolvency in 1928, when this case was tried. These things cannot be eradicated from the minds of the jury. They do not possess the capacity which trained jurists possess. They try all cases as of the date when the evidence is introduced before them. It is a well known fact that the orchard industry of California was when this case was tried, and still is, in most precarious circumstances. Insolvency has overtaken a great percentage of the orchardists in our state and is closely pursuing the rest. This jury knew this. As a corollary, land less adapted to commercial orcharding than the best lands of our state, first feel the pinch of falling price. And likewise, lands adapted to commercial orcharding in 1921 have by the general fall of prices, and increase of expense, been eliminated from that class.

We submit that the instruction complained of should not have been given.

We ask that the judgment be reversed.

Respectfully submitted,

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